

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-1020

P15

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 75-1020

UNITED STATES OF AMERICA,

Appellee,

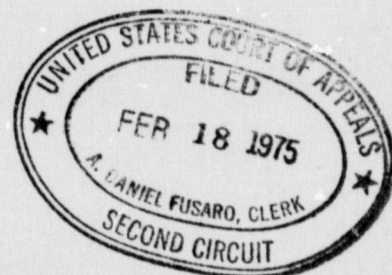
-against-

FRANCISCO G. BACALLAO,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF
CONVICTION OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

APPELLANT'S BRIEF



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - - x
UNITED STATES OF AMERICA, :
Appellee, :
-against- :
FRANCISCO G. BACALLAO, :
Defendant-Appellant. :
- - - - - x

APPELLANT'S BRIEF

Preliminary Statement

The defendant FRANCISCO G. BACALLAO appeals from the terms of a judgment of conviction rendered on January 14, 1975, in the United States District Court for the Southern District of New York, after a trial by jury before Hon. Kevin T. Duffy, U.S.D.J., which judgment adjudged appellant guilty as charged in the indictment of the crimes of Conspiracy to Violate the Narcotics Laws of the United States (Title 21, U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(A) as charged in the First Count and of Distributing and Possessing with Intent to Distribute a Schedule II Narcotic Drug Controlled Substance

(109.99 grams of cocaine hydrochloride) in violation of Title 21, U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(A) and of Title 18, U.S.C. § 2, as charged in the Second Count. Appellant received concurrent terms of four (4) years imprisonment followed by Special Parole of three (3) years

Appellant's application at the time of sentence for stay of execution of judgment and for bail pending appeal was denied (S5) and appellant is presently serving the term of imprisonment imposed under the judgment now being appealed.

Issues Presented For Review

WAS THE GUILT OF THE APPELLANT PROVEN BEYOND A REASONABLE DOUBT, AS A MATTER OF LAW, AND DID THE TRIAL COURT ERR IN DENYING MOTIONS FOR DISMISSAL OF THE INDICTMENT MADE AT THE CLOSE OF THE GOVERNMENT'S CASE FOR FAILURE TO PROVE A PRIMA FACIE CASE, AGAIN MADE AT THE CLOSE OF THE ENTIRE EVIDENCE FOR FAILURE TO PROVE GUILT BEYOND A REASONABLE DOUBT, AND THE MOTION MADE AT TIME OF SENTENCE TO SET ASIDE THE VERDICT AND FOR A NEW TRIAL BASED UPON THE SAME GROUNDS?

Concise Statement of the Case

THE TRIAL

During the course of the trial that took place on December 9 and 10, 1974, with the taking of testimony and concluded on December 11, 1974, with summations, the charge of the Court and the verdict finding appellant guilty as charged, the Government presented its case through the testimony of six witnesses-Special Agents William Simpson, Robert E. Grant, Robert Palumbo and Paul Buceti and by Hugo Sanchez Rodriguez and Edgardo Rivera, who were originally named as parties defendants in the indictment but who pled guilty to the conspiracy count immediately prior to the commencement of the trial. The defendant-appellant took the stand in his own defense as the only witness on the defendant's case.

The Government's Case-The testimony adduced on the trial in support of the Gov'ts case was intended to show that during the month of September, 1973, Special Agent Robert E. Grant of the Drug Enforcement Administration assigned Special Agent William Simpson to perform an undercover assignment together with special informant Paul Romero, also known as "The Argentine",

in Bronx County (14,40)*, that the informant's job was to introduce Sp. Agent Simpson, who was to pose as a prospective cocaine buyer, to drug peddlers whom he knew who sold cocaine (14,40); that on September 10th, pursuant to Sp. Agent Grant's instructions, Sp. Agent Simpson accompanied the informer, who was a drug violator who was cooperating with the Drug Enforcement Administration in the hope of obtaining consideration in his case (27,41), to the area of Burnside Avenue and Grand Concourse, Bronx, New York, where the informant was to introduce Sp. Agent Simpson to an individual who had formerly offered cocaine to the informer (42); this individual, Edgardo Rivera, who according to the testimony had met the informant several days earlier and had introduced him to Hugo Sanchez Rodriguez (93,144) who was a relative of Rivera through marriage (92,119,140). According to the testimony Sp. Agent Simpson, accompanied by the informer Romero, proceeded by car to the area of 181 Street and the Grand Concourse on September 10th arriving at about 6:00 P.M. where they met Rivera (17,145); at the time a surveillance team headed by Sp. Agent Grant was in the area (42,43); after a conversation during which cocaine was discussed and during which Sp. Agent Simpson refused to go to Rivera's apartment but insisted on conducting the transaction in the street,

* Numerals in parentheses unless otherwise indicated refer to page numbers of the transcript of the trial. Numerals in parentheses preceded by the letter "S" refer to the page number of the transcript of the sentence.

Rivera left for a short while and returned at about 7:30 P.M., shortly afterward appellant and Sanchez drove up in appellant's car, parked and were introduced to the informer and Sp. Agent Simpson by Rivera (19,30,44)-there was testimony that previously Rivera and Sanchez met the informer on September 7 and 8 and at that time discussed amounts and prices of cocaine with him finally agreeing to sell one eighth of a kilogram for \$2,800 or \$2,900 and that this price was agreed to the next day by the informer and Rivera and Sanchez (94-96,144,145). There was further testimony that when appellant and Sanchez drove up appellant double parked his car; that Rivera introduced the informer and Sp. Agent Simpson to the new arrivals (19,30,44, 96,145); that as Sp. Agent Simpson spoke no Spanish and as appellant spoke no English that Sanchez served as interpreter (20,97,146,172); that in answer to Sp. Agent Simpson's inquiry about making the purchase in the street as soon as possible, Sanchez, interpreting for appellant stated that the cocaine had arrived but that it had to be cut and would be ready that night at about 10:00 P.M.; Sp. Agent Simpson in reply stated that he would wait no longer than 8:30 P.M. (20,30,98); Rivera and Sanchez then entered the car with the appellant and drove off; Sp. Agent Simpson and the informer waited until 8:45 P.M. and when no one showed up at that time they left. According to the testimony of Sanchez, after he

and appellant left the area in the car that night they drove to the area of 176th Street looking for a woman called "La Jefe", who was appellant's connection for the cocaine but they were unable to find her; that this fact was communicated by him to Rivera who was told by Sanchez that when appellant contacted "La Jefe", that Sanchez would let him know (101); that a meeting was set up with the informer and Sp. Agent Simpson the next day in the same area by the Grand Concourse; that on that day, September 11th, the informer and Sp. Agent Simpson arrived in the area at about 7:30 P.M. and waited until Rivera showed up about an hour later; Rivera left shortly afterward saying that he was on his way to school but that he would stop off at the apartment of Sanchez and let him know that the informer and Sp. Agent Simpson were waiting on the Grand Concourse; that the informer and Sp. Agent Simpson waited for an hour more and when at the end of that time no one appeared, they left the area (22,46,147). Rivera testified that he went to Sanchez' apartment that night; according to Sanchez he then informed Rivera that he had been unable to contact the appellant (102). Rivera on the other hand testified that appellant was at the apartment along with Sanchez and that the three of them discussed price and how dangerous it was to make a sale in the street (147). According to the testimony on September 12th, the informant, in the presence of Sp. Agent Grant made a telephone call to Rivera, which telephone call was

recorded with the informers consent and was overheard by Sp. Agent Grant; the next day, September 13th, at between 5:00 to 5:30 P.M. Sanchez saw appellant who told him that he thought that he would be able to get the cocaine that day and about a half hour later Sanchez imported this information to Rivera who then set up a meeting with the informer and Sp. Agent Simpson at the same area of the Grand Concourse where they had previously met between 7:30 and 8:00 P.M. that evening (24,103); Sp. Agent Simpson and the informer proceeded to the aforementioned location by car where they met Rivera at the appointed time; Rivera told them that his friends were already at his apartment with the quarter kilogram of cocaine and that Sp. Agent Simpson and the informer should go with Rivera to his apartment to conclude the transaction; Sp. Agent Simpson stated that he had the money but that he wanted the package brought to him on the Grand Concourse and he refused to go to the apartment; that finally it was agreed that the informer would go with Rivera to his apartment to sample the cocaine and report to Sp. Agent Simpson who would remain on the Grand Concourse; at about this same time, according to the testimony of Sanchez, he and the appellant had finally found "La Jefe" on 176th Street and she arranged with appellant to deliver the cocaine shortly afterward to appellant's apartment at 1400 University Avenue in the Bronx, which she did

in the presence of Sanchez and he and appellant then proceeded by car to Rivera's apartment (105). In the meanwhile Rivera and the informant followed by surveillance agents proceeded on foot to Tiebout Avenue in the vicinity of 184th Street and entered the apartment house numbered 2390 Tiebout Avenue where Rivera lived in Apt. 1B (49,50,77); that when they arrived at the apartment no one was there so they went downstairs to buy some beer and as they were returning to the house Sanchez and appellant drove up in appellant's car (50,105,149,175)-it was now approximately 8:00 P.M. (78,106)-that as Sanchez and appellant exited the car appellant picked up a brown paper bag from the front seat and put it in his pocket and then went around to the trunk of the car to pick up a bag of tools (107,130) and all of them, Rivera, the informant, Sanchez and appellant went into the building together (50,149,175); that on entering the apartment appellant took the cocaine that was in a plastic container, out of the brown paper bag and poured it on the living room table where the informant sampled it, expressed his satisfaction with it and left the apartment saying that he was going to get the money (108,150); that on leaving the apartment the informer met Sp. Agent Grant and Sp. Agent Smith who were in the hallway and the agents shortly afterward gained entry to the apartment through the

front door (50,51); inside of the apartment, according to the testimony of Sanchez, immediately after the informant left, appellant poured the cocaine back into the plastic container which he repacked into the brown paper bag and he gave it to Rivera instructing him to wait with the bag by the bedroom window in case anything happened (108,109)-according to the testimony of Rivera, the idea to repack the cocaine and to keep it close to the bed room window in case anything happened was Rivera's own idea and act (151)-; that in response to a ring or knock on the apartment door, the door was opened by appellant who was taken into custody by the door in the foyer area of the apartment by Sp. Agent Grant (54,63), Sanchez was arrested in the living room area (64,110,135) and Rivera was arrested in the area of the kitchen after he had thrown the package of cocaine out of the bed room window when the agents broke in and announced themselves; the package which was caught by Sp. Agent Robert Palumbo who was stationed in the back yard of the building (79) along with Sp. Agent Paul Buceti (84) was admitted in evidence as Gov't. Exhs 2,2A and 2B (189), Ex. 2 being the evidence envelope containing the other exhibits, Ex. 2A being the plastic container containing a white powder and Ex. 2B being the brown paper bag in which the plastic container was carried (80).

Gov't. Ex. 1 in evidence (189) is the stipulation as to the fact that if the chemist would testify that his testimony would be that he analyzed the white powder and found it to contain cocaine.

The Defendant's case was presented by the appellant FRANCISCO G. BACALLAO testifying in his own defense as follows: that he has never previously been arrested; that he was born in Cuba and came to the United States in 1968 (193); that at the time of his arrest in September 1973 he was gainfully employed at Advance Maintenance Company as a plumber earning \$190 per week; that he lived at the time of his arrest with his wife and four children at 1400 University Avenue (194); that he knew Hugo Sanchez Rodriguez for about five or six months prior to the time of his arrest and that he met him at Advance Maintenance Company, the company where appellant was employed and that later he met Edgardo Rivera (195-197). Appellant denied his guilt of the charges set forth in the indictment (196) stating that he had been with Sanchez and Rivera at the various places on the Grand Concourse and at Rivera's apartment, as mentioned during the Gov'ts case but that he did not know that Sanchez and Rivera were dealing in drugs (196) because, although he admitted being with Sanchez on the Grand Concourse on September 10, 1973, having gone for a ride with him after they both had finished

working at their place of employment (207,209), that as he did not understand English (208,214) he could not follow the conversation with the other people and that neither Sanchez or Rivera ever spoke to him about cocaine (206,213,215). Appellant further testified that on the night of the arrest that he had gone for a ride with Sanchez after work and they ultimately wound up at Rivera's apartment after Sanchez asked appellant to fix his cousin's (Rivera's) bathroom (197); that appellant brought his tools up to the apartment and he and Sanchez sat down and had some beers with the other people in the apartment; that one of the fellows left and shortly thereafter someone knocked on the door, appellant opened the door and he was grabbed and handcuffed (197). Appellant denied bringing cocaine into the apartment (198) or seeing it in the apartment (212). Appellant further testified that the day after his arrest when he was in the Court House and before he was arraigned before the magistrate that he was interviewed in the office of the United States Attorney with the aid of an interpreter and that in answer to the questions asked that he told the truth (199-205).

The interview form filled in and signed by the appellant, by the Assistant United States Attorney present and by Sp. Agent Grant, in which appellant denied any involvement with narcotics and with the present charges was admitted in evidence as Defendant's Ex. A (68,205).

THE ARGUMENT

Point

AS A MATTER OF LAW THE GUILT OF
THE APPELLANT WAS NOT PROVEN
BEYOND A REASONABLE DOUBT.

It is the appellant's position on this appeal that as a matter of law and based upon the entire evidence as was presented on the trial, that his guilt had not been proven beyond a reasonable doubt and that therefore the Trial Court erred in denying defendant's motion for dismissal of the indictment made at the close of the Government's Case because of failure to prove a prima facie case (218) which motion was reserved until the close of evidence on the entire case (190,191); in denying defendant's motion to dismiss the indictment on the close of the entire case for failure to prove guilt beyond a reasonable doubt (218); and in denying defendant's motion for a new trial at the time of sentence pursuant to FRCP Rule 33 and to set aside the verdict on the ground that said verdict is against the weight of evidence and contrary to law (S3)-this motion having been reserved at the time of the verdict(288).

This case is unique in that the Assistant United States Attorney has taken the position that the facts that appellant

is in his forties (255), has never previously been arrested or convicted of a crime (193), is gainfully employed and was making a good living at the time of his arrest (258), that he gave a statement to the United States Attorney's Office immediately prior to his arraignment when he was questioned, which statement was admitted in evidence as Defendant's Exhibit A (205) and the fact that he testified fully on this trial, are factors that should be held against him as tending to prove his guilt, while the perjury of Edgardo Rivera (177-188, 257) and the criminal record of Hugo Sanchez Rodriguez (110-112, 256) was glossed over and excused.

Apparently the jury followed the Assistant United States Attorney's line of reasoning as it convicted, apparently on the above factors and arbitrarily rejected the defense.

Reviewing the contradictions in the Government's Case, it is noteworthy to observe that there were a number of conflicts in testimony by the various Gov't witnesses. The contradictions in testimony are as follows:

First-According to the testimony of Sp. Agent Robert E. Grant, in early September, 1973 he assigned Sp. Agent William Simpson to do undercover work in the Bronx along with the informant Paul (the Argentine) Romero, a drug violator who was cooperating with the D.E.A. The informant was to introduce Sp. Agent Simpson who was posing as a buyer of cocaine, to

a drug peddler who had formerly offered cocaine to him (40-42); this drug peddler turned out to be Rivera (18), who, when he testified as a Gov't witness stated that he had met the informant for the first time on September 7th (94) and that he had never sold him cocaine before (162) nor had Sanchez ever previously supplied him with narcotics (164) and that he only met the appellant for the first time about a week before September 10th (169).

Second: According to the testimony of Edgardo Rivera, on September 11th shortly after 7:30 P.M. that he went to the apartment of Hugo Sanchez Rodriguez and discussed narcotics with him and with appellant who was there (147). Sanchez when testifying as a Gov't witness testified that appellant was not at the apartment and that he at the time informed Rivera that up until that time he had been unable to contact the appellant (102)-see page 6 of this brief.

Third: Sp. Agent Robert E. Grant testified that on September 13th outside of 2390 Tiebout Avenue, Bronx, New York (the apartment house in which Rivera resided), that he observed appellant take a brown paper bag out of the trunk of his car and enter the building (50) leaving the impression that this brown paper bag was Ex. 2B in evidence (80,189) referred to later in the trial which was caught by Sp. Agent Palumbo (80). Sanchez on the other hand testified that the bag taken from the trunk

contained tools (107,130,133) and Rivera testified that he had asked appellant to do plumbing repairs at his apartment (153,174).

Fourth: According to the testimony of Sanchez, on September 13th shortly prior to the arrest in Rivera's apartment, that after the informant left that it was appellant who poured the cocaine back into the plastic container and rewrapped it in the bag and instructed Rivera to wait with the bag by the bedroom window to dispose of it if anything happened (108,109). Rivera, on the other hand testified that it was his idea to repack the cocaine and to throw it out the window, which he did, if anything happened (151)-see page 9 of this brief.

Other factors to be taken into consideration on the entire case besides the abovementioned contradictions are:

Fifth: The obvious perjury by Rivera when he testified on cross-examination that he did not expect consideration to be given to him at the time of sentence because of testimony being given by him on this trial (178)*, that he never discussed

*See page 5 of the transcript of the minutes of the plea of guilty taken by Edgardo Rivera on December 9, 1974, which is part of the supplemental record filed on this appeal.

this case with the Assistant United States Attorney trying this case or with any other representative of the United States Attorney's Office prior to his testifying in this case (179), which denials continued into redirect examination by the Assistant United States Attorney (180) where the fact that Rivera had discussed the case previously with his questioner had to be drawn out like a tooth, slowly and unwillingly (182-186).

Sixth: The fact that the Gov't witness Hugo Sanchez Rodriguez, who was on probation on a State Robbery conviction for a crime committed in March, 1971, was still free on low bail at the time of this trial, after he had pled guilty to the charge of conspiracy as set forth in this indictment and was not committed as a State Probation violator for acts which according to his testimony on this trial are clearly a violation of the terms of his State probation.

Seventh: The fact that the informant, Paul (the Argentine) Romero, who figured prominently in the testimony, was not called by the Gov't as a witness where questions were raised on the trial that only he could clear up, and no explanation was given by the Government for its failure to call him as a witness.

In addition to the aforementioned contradictions and questions raised on the Government's Case, it should be born

in mind on the question of reasonable doubt that the appellant took the stand as a witness in his own defense and produced evidence that was credible and was not discredited on the stand.

This is not the case of a single apparent inconsistency in the testimony of a single Government witness, as was referred to by this Court in United States v. Small, 376 F2d 257 (U.S.C.A. 2nd Circuit, 1967), where such fact was held to be an insufficient basis for an appellate ruling that all of that witness' testimony was unbelievable as a matter of law, but this appeal brings up for review a pattern permeating the entire trial and the entire framework of the evidence adduced.

That the sufficiency of the evidence and the weight thereof can be reviewed by an appellate court to determine whether guilt beyond a reasonable doubt has been proven, see People v. Hicks, 273 N.E. 2d 450, 463 (Illinois) (Appellate Court of Illinois, First Dist., Fifth Div. 1971), where it was held that a jury may not disregard a defendant's testimony if it is probable, corroborated and is not contradicted in its material parts. See also 23 C.J.S. § 905, page 546.

In People v. Caruso, 184 A.D. 512 (Supreme Court of the State of New York, App. Div. 2d. 1918), a judgment of conviction for the crime of ROBBERY IN THE FIRST DEGREE was set aside on appeal because of the nature of the testimony of the complainant

and because of the conflicts between his testimony and that of another prosecution witness on the trial. In ordering a new trial, the Appellate Division, Second Department stated:

" On this record the jury convicted the defendant of robbery in the first degree. This seems a surprising result, for we find no capital error in ruling upon evidence, nor in the charge. We think the reason for the verdict may be found in incidents of the trial which moved the jury to believe that the defendant was a hardened and desperate man. It is not necessary to detail them; it is enough to say that they include the method of the cross-examination, his answers therein, and the not unjustifiable but evident indication of the court's opinion. No person can read the record without feeling that the defendant is a lawless and dangerous man. But this does not justify conviction. We think the relevant evidence directed to the factum of the crime is not sufficient to exclude reasonable doubt and that defendant should have a new trial."

It is respectfully submitted, that for the reasons set forth in this point, that the judgment of conviction should be reversed and the indictment ordered dismissed with entry of judgment of acquittal or a new trial should be ordered.

Conclusion

THE JUDGMENT APPEALED FROM SHOULD BE REVERSED
WITH DIRECTION TO THE LOWER COURT TO ENTER
JUDGMENT OF ACQUITTAL OR A NEW TRIAL SHOULD BE
ORDERED.

Dated: February 14th 1975

Respectfully submitted,

Allen S. Stim

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